The Ongoing Debate about Mediation in the Context of Domestic Violence: A Call For Empirical Studies of Mediation Effectiveness

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I. INTRODUCTION

Several schools of thought exist as to whether mediation is appropriate when the underlying relationship involves domestic violence. Some argue that mediation is always inappropriate when a couple has a history of domestic violence. Others believe


2 See, e.g., Janet Rifkin, Mediation from a Feminist Perspective: Promise and Problems, J.L. & INEQUALITY, 21, 30-31 (1984) (describing feminist criticisms of mediation that argue that cases involving mediation should be resolved by courts); Fischer, Vidmar, & Ellis, supra note 1, at 2155; Christine McLeod Pate, “Family Mediation Works for Women and Children (Who Aren’t Victims of Domestic Violence),” 28 AK BAR RAG 17; Allen M. Bailey & Carmen Kay Denny, Attorneys Comment on Mediation & Domestic Violence, 27 AK BAR RAG 16 (July/Aug. 2003); Penelope Bryan, Killing Us Softly: Divorce
that, while mediation in cases of domestic violence should not be barred, it should
generally not be encouraged. Yet a third group focuses on mandatory mediation and
argues that mandatory mediation should never occur when the relationship has a history
of domestic violence, unless the victim wishes to go through mediation. Another a
significant group believes that each situation should be evaluated individually through
screening to determine whether mediation is appropriate, and there could be many
situations where mediation could be appropriate even when there has been a history of
domestic violence. Finally, there is a small group that argues that mediation can be

Mediation and the Politics of Power, 40 Buffalo L. Rev. 441 (1992); Andree G. Gagnon, Ending
Mandatory Divorce Mediation for Battered Women, 15 Harv. Women’s L.J. 272 (1992); Desmond Ellis,
(“Mediation is inappropriate in the presence of pre-separation abuse and alcohol and/or drug abuse.”). Even if a state mandates exemption of cases involving domestic violence from the mediation process, there can be difficulty in determining what standard should be used to determine whether a case should be exempted. See Craig A. McEwen, Nancy H. Rogers, & Richard J. Maiman, Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation, 79 Minn. L. Rev. 1317, 1337-38 (1995).
4 See, e.g., Hart, supra note 1; Gagnon, supra note 2.
5 See, e.g., Chandler, supra note 1; Peter Salem & Billie Lee Dunford-Jackson, Beyond Politics and Positions: A Call for Collaboration Between Family Court and Domestic Violence Professionals, 46 Fam. Ct. Rev. 437, 437 (July 2008); Leonard Edwards & Steve Baron, Surreply, Domestic Violence and Mediation: A Dialogue, 46 Fam. Ct. Rev. 595, 596 (Oct. 2008) (arguing that, even in cases of child custody disputes where there is a context of domestic violence, mediation can offer both parents the ability to determine for themselves what custody arrangements will be and usually do so in a way that is at least as good, if not better, than the adversarial process); Luisa Bigornia, Alternatives to Traditional Criminal Prosecution of Spousal Abuse, 11 J. Contemp. Legal Issues, 57, 60-61 (2000); Andrew Schepard, The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management, 22 U. Ark Little Rock L. Rev. 395, 421 (2000); Kathleen O’Connel Corcoran & James C. Melamed, From Coercion to Empowerment: Spousal Abuse and Mediation, 7 Mediation Q. 303 (Summer 1990); McEwen, et al., supra note 2, at 1339 (“Given the view that lawyer advocacy helps balance power in cases of abuse, blanket categorical exclusion would be unnecessary if lawyers participated actively in mediation and if provisions were made for separating the parties in mediation upon request.”).
effective in almost any family law case, even those in which domestic violence is a factor.\(^6\)

State legislatures, courts, and mediation programs have responded to these arguments in a variety of ways. Some states have approached the issue by exempting from family mediations situations where there has been domestic violence, while other state statutes do not provide for such an exemption.\(^7\) Court-sponsored and community-based mediation programs also differ in their approaches to domestic violence issues. Most programs have instituted a screening process to evaluate whether disputes are appropriate for mediation and whether the parties have a history of domestic violence that

\(^6\) This argument was first made in the early 1980s. See Charles A. Bethel & Linda R. Singer, *Mediation: A New Remedy for Cases of Domestic Violence*, 7 VT. L. REV. 15 (1982). Although this perspective had few supporters in the 1980s and 1990s, there has been more support for this argument in recent years. See, e.g., Leonard Edwards, Steve Baron, & George Ferrick, A Comment on William J. Howe and Hugh McIsaac’s Article “Finding the Balance” Published in the January 2008 Issue of Family Court Review, 46 Fam. Ct. Rev. 586, 586 (2008) (arguing that “mediation practice has advanced so far that even these persons (those with serious issues of domestic violence, substance abuse, and mental health) should be given an opportunity to participate in mediation before being referred to the adversarial court process”); Leonard Edwards, Comments on the Miller Commission Report: A California Perspective,” 27 PACE L. REV. 627, 663 (2007) (“After years of experience in cases involving parents, domestic violence, and child custody, I have concluded that if properly designed and operated, mediation provides a safe, effective way of resolving these custody disputes.”).

could affect the mediation. Many mediation programs provide training for mediators to recognize signs of domestic violence and be able to manage situations where it becomes an issue, but not all do.

In spite of the fact that scholars and mediators still debate these issues and legislatures and courts have developed a variety of “solutions,” very few empirical studies have evaluated the effectiveness of mediation in cases where there is a history of domestic violence. Those studies that have been done are very limited, involving only a small number of subjects. Scholars rely mostly on anecdotal evidence to support their arguments. Many of their claims seem intuitive, but more needs to be done to evaluate how effective mediation programs are in handling disputes involving domestic violence because of the large number of those disputes that end up in mediation. In addition, because of the variations in how programs address screening and mediator training issues, among other aspects of the mediation process, empirical data is necessary to evaluate which approach(es) are better at addressing domestic violence issues in family mediations and, most importantly, which ones help to improve fairness of mediation outcomes and reduce future incidents of domestic violence.

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9 Ver Steegh, *Yes, No, and Maybe*, supra note 1, at 189-90.


Regardless of the ongoing debate about its appropriateness for domestic violence victims, mediation has become the norm in family law cases involving custody disputes, divorces, and property disputes. As a result, more and more situations involve victims of domestic violence. In Part II, this paper will explore the potential challenges of mediating family law cases involving domestic violence, including definitional challenges, process issues, outcome issues, and public policy implications. Concerned about the implications of this trend for domestic violence victims, state legislatures, courts, and mediation programs have sought to develop improved processes for fair and safe family law mediations, and the paper will analyze the most common of those processes in Part III. Part IV will describe what scholars have done to determine the effectiveness of mediation programs in addressing domestic violence issues and will advocate further empirical research in this area. Finally, Part V will propose a potential study to be implemented on a widespread basis to evaluate mediation effectiveness where parties have a history of domestic violence.

II. POTENTIAL PROBLEMS WITH FAMILY MEDIATION WHEN THE COUPLE HAS A HISTORY OF DOMESTIC VIOLENCE

Legal scholars, mediation advocates, and domestic violence victims’ advocates have long debated whether mediation is appropriate where the parties have a history of

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12 For example, a survey of California’s court-sponsored mediation program found that approximately fifty percent of all cases involve a history of some domestic violence. Edwards, supra note 6, at 665. See also Jennifer P. Maxwell, Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators, 37 FAM. & CONCILIATIONCTS. REV. 335, 335 (1999) (estimating that between fifty and eighty percent of all cases referred to court-based family mediation programs involve domestic violence); Nancy Thoennes et al., Mediation and Domestic Violence: Current Policies and Practices, 33 FAM. & CONCILIATIONCTS. REV. 6, 7 (1995) (stating that at least fifty percent of cases referred to family court mediation programs involve domestic violence). But see Chandler, supra note 1, at 331 (finding that only twenty-three percent of a group of 216 divorcing couples had a history of domestic violence).
domestic violence. Their concerns generally fall into four basic categories. First, there are challenges about how to define “domestic violence” when determining whether cases are appropriate for mediation. Second, there are concerns about whether the mediation process can be fair, voluntary, safe, and neutral when the parties have a history of domestic violence. Third, there are concerns about potential outcomes of such mediations and whether those outcomes can be fair and safe for victims. Finally, there are public policy concerns that are also interwoven into the debates about mediation when there is a history of domestic violence. The following subsections develop these potential problems with family mediation when the parties have a history of domestic violence.

A. The Challenge of Defining “Domestic Violence”

One of the most immediate problems with determining when it is appropriate to mediate family law cases where there is a history of domestic violence is that there are a number of challenges in determining how to even define “domestic violence” in this

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13 This article does not address some scholars’ arguments that mediation can be used, in the context of restorative justice, to specifically address domestic violence issues. See, e.g., Lawrence W. Sherman, Domestic Violence and Restorative Justice: Answering Key Questions, 8 VA. J. SOC. POL’Y & L. 263 (2000-2001); Arby Aiwazian, Note, Transformative Mediation: Empowering the Oppressed Voices of a Multicultural City to Foster Strong Democracy, 11 SCHOLAR 31, 39-40 (2008).

14 See infra Part IIA. For examples of arguments about whether mediation should be mandatory in family law cases and, if so whether there should be an exception for cases involving a history of domestic violence, see, for example, Knowlton & Muhlhauser, supra note 1, at 264; Loomis, supra note 1; Edwards, supra note 6, at 661-62; Grillo, supra note 3; Lauri Boxer-Macomber, Revisiting the Impact of California’s Mandatory Custody Mediation Program on Victims of Domestic Violence Through a Feminist Positionality Lens. 15 ST. THOMAS L. REV. 883, 889 (2003); Alana Dunnigan, Comment, Restoring Power to the Powerless: The Need to Reform California’s Mandatory Mediation for Victims of Domestic Violence, 37 U.S.F. L. REV. 1031 (2003); Laurel Wheeler, Mandatory Family Mediation and Domestic Violence, 26 S. ILL. U. L. J. 559 (2002); Maxwell, supra note 12, at 337-38.

15 See infra Part IIIB.

16 See infra Part IIC.

17 See infra Part IID.
context. First, because legislatures have passed laws to address domestic violence, there are legal definitions of “domestic violence.” Those definitions may or may not reflect definitions of “domestic violence” or “domestic abuse,” as understood by society, victims’ rights advocates, or scholars. Second, although “domestic violence” has historically been used to refer specifically to physical abuse, most experts today recognize that there are other forms of abuse that could fit into this category as well, including emotional or verbal abuse, extreme levels of control over actions or finances, etc. Third, mediation proponents have begun to recognize that not only violent acts but also threats of violence may have a negative impact on the mediation process. Fourth, although many mediation advocates would agree that mediation should not be used where there are allegations of “serious” domestic violence, they are not in agreement about how to define “seriousness.” Finally, mediation experts recognize that there are additional factors that interact with how “domestic violence” should be defined when determining

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18 See, e.g., Loretta M. Frederick, Questions About Family Court Domestic Violence Screening and Assessment, 46 FAM. CT. REV. 523, 524-26 (July 2008); Nancy Ver Steegh, Differentiating Types of Domestic Violence: Implications for Child Custody, 65 LA. L. REV. 1379 (2005) [hereinafter, Ver Steegh, Differentiating Types of Domestic Violence].
21 See, e.g., Ver Steegh & Dalton, Report from the Wingspread Conference, supra note 19, at 456-57; Ellis & Stuckless, supra note 20.
22 Lerman, supra note 1, at 73, 76, 102.
which parties are capable of mediating, including timing issues and the context in which the domestic violence has occurred.\textsuperscript{23}

Loretta M. Frederick, senior legal and policy advisor of the Battered Women’s Justice Project, has raised an important issue that courts and other mediation programs should consider in designing screening processes.\textsuperscript{24} For example, how a mediation program defines “domestic violence” can be relevant to whether the screening process is effective in discovering whether domestic violence exists in a relationship and therefore how the court or mediation program should treat that situation.\textsuperscript{25} When state laws specify what programs should be available based on whether there is a history of domestic violence, the legal definition of domestic violence will be relevant.\textsuperscript{26} At the same time, there can also be “contextual” definitions of domestic violence.\textsuperscript{27} In other words, how one evaluates the potential influence of domestic violence in a specific situation with a couple may depend on “(1) the perpetrator’s intent in using violence and abuse against a partner, with implications for his or her approach to parenting; (2) the meaning which the victim and children take from the violence; and (3) the effect of the abuse on the adult victim and children, including the harm done and the risk of physical and other forms of violence.”\textsuperscript{28}

\begin{thebibliography}{9}
\bibitem{24} Frederick, \textit{supra} note 18. \textit{See also} Ver Steegh, \textit{Differentiating Types of Domestic Violence, supra} note 18.
\bibitem{25} Frederick, \textit{supra} note 18, at 524-26.
\bibitem{26} \textit{Id.} at 524. \textit{See also} Model Standards of Practice for Divorce and Family Mediators, 38 FAM. & CONCIL. CTS. REV. 110, 120 (2000) (Standard XI.A.) (setting out that domestic violence” will be defined by state law.
\bibitem{27} Frederick, \textit{supra} note 18, at 524-26.
\bibitem{28} \textit{Id.}
\end{thebibliography}
Scholars have also begun to differentiate between different types of domestic violence and to argue that the type may matter when determining whether a couple can effectively mediate.\textsuperscript{29} For example, Joan Kelly and Michael Johnson have defined four different types of domestic violence: coercive controlling violence, violent resistance, situational couple violence, and separation-instigated violence.\textsuperscript{30} Kelly and Johnson define coercive controlling violence, also sometimes called “intimate terrorism,” as “a pattern of emotionally abusive intimidation, coercion, and control coupled with physical violence against partners.”\textsuperscript{31} Coercive controlling violence is what most people typically associate with domestic violence. The second type of domestic violence, Violent Resistance, has also been defined as “female resistance,” “resistive/reactive violence,” and “self-defense.”\textsuperscript{32} Situational couple violence is a “type of partner violence that does not have its basis in the dynamic of power and control.”\textsuperscript{33} Finally, separation-instigated violence is a term used to describe violence that does not occur until a couple is in the process of ending their relationship.\textsuperscript{34} Kelly and Johnson believe that an understanding of the different types of domestic violence can lead to better screening processes.\textsuperscript{35}


\textsuperscript{30} Kelly & Johnson, \textit{supra} note 29, at 477.

\textsuperscript{31} \textit{Id.} at 478.

\textsuperscript{32} \textit{Id.} at 479.

\textsuperscript{33} \textit{Id.}

\textsuperscript{34} \textit{Id.}

\textsuperscript{35} \textit{Id.} at 477-78 (“The value of differentiating among types of domestic violence is that the appropriate screening instruments and processes can be developed that more accurately describe the central dynamics of the partner violence, the context, and the consequences.”).
Applying these different definitions, it is possible to see how many cases involving situational couple violence might still be possible to mediate, because that history would not necessarily signal potential problems with power imbalances or intimidation.\textsuperscript{36} On the other hand, many cases involving coercive controlling violence would most likely not be appropriate for mediation.\textsuperscript{37} Cases involving separation-instigated violence would most likely have to be evaluated on a case-by-case basis to determine whether the victim is capable of mediating, but those cases would certainly emphasize the need to have protocols in place before, during, and after the mediation to protect the victim from additional violence.\textsuperscript{38}

Ohio provides an example of how some states have chosen to define domestic violence more broadly than the statutory term. The Ohio Supreme Court’s domestic violence training program for mediators focuses on detecting and addressing “domestic abuse” rather than “domestic violence,” because “domestic abuse” “connote[s] a broader range of behaviors that should be of concern to mediators and their stakeholders when assessing an individual’s capacity to negotiate on his or her own behalf and on behalf of his or her children.”\textsuperscript{39} In contrast, the term “domestic violence” is a statutory term in Ohio, and the court was concerned that its use “may result in a narrowed understanding of the dynamics at play in these situations.”\textsuperscript{40}

\begin{itemize}
\item \textsuperscript{36} Ver Steegh & Dalton, \textit{Report from the Wingspread Conference, supra} note 19, at 456-57.
\item \textsuperscript{37} \textit{Id.}
\item \textsuperscript{39} \textit{Supreme Court of Ohio, Domestic Abuse Issues: Training for Mediators and Other Professionals} (2\textsuperscript{nd} Ed. 2007), at I.
\item \textsuperscript{40} \textit{Id.}
\end{itemize}
For example, the Ohio Supreme Court's training materials set out the following definition of “domestic violence,” as defined by the National Council of Juvenile and Family Court Judges (NCJFCJ) Model Code on Domestic and Family Violence:

the occurrence of one of more of the following acts by a family or household member, but does not include acts of self-defense:

- Attempting to cause or causing physical harm to another family or household member
- Placing a family or household member in fear of physical harm or
- Causing a family or household member to engage involuntarily in sexual activity by force, threat of force or duress.  

In contrast, the training materials also provide the American Bar Association Commission on Domestic Violence’s broader definition of “domestic abuse”:

A pattern of abusive and controlling behaviors that one current or former intimate partner or spouse exerts over another as a means of control, generally resulting in the other partner changing his or her behavior in response.

Domestic abuse may include physical violence, coercion, threats, intimidation, isolation, and emotional, sexual or economic abuse. Violence or fear of violence does not have to be present for these behaviors to be abusive.

By defining “domestic violence” broadly to include the term “domestic abuse,” Ohio seeks to ensure that its screening programs catch more aspects of a couple’s history that could potentially undermine the validity and safety of the mediation process. Because behavior associated with domestic abuse could have a similar influence on the mediation process as domestic violence, it makes sense to screen more broadly for domestic abuse prior to conducting family law mediations.

\footnote{SUPREME COURT OF OHIO, DOMESTIC ABUSE ISSUES, supra note 39, at IV-20.}

\footnote{Id.}

\footnote{SUPREME COURT OF OHIO, DOMESTIC ABUSE ISSUES, supra note 39, at I.
Because most mediation advocates agree that cases involving a “serious” history of domestic violence should be excluded from family law mediations, it is important to think about how “seriousness” should be defined.44 “Seriousness” is often a factor in determining which cases are appropriate for mediation, and definitions which are either too broad or too narrow may include cases that are really not appropriate for mediation or exclude cases that could be successfully mediated. For example, one way to evaluate whether cases involving domestic violence could be mediated would be to measure how serious the injury is,45 while another way would be to look at the number of incidents involved.46

A couple of hypothetical examples illustrate this debate. Imagine a case where the abuser had sent the victim to the hospital one time with several broken bones, a concussion, and bruising over much of her body. If the mediation program applied the first definition of seriousness, serious of injury, to the screening, then this couple would be excluded from mediation. But one could imagine situations in which the victim would be fully capable of participating in mediation in spite of the severity of that past incident. Maybe this single incident occurred several years ago and has not had the kind of psychological effect on the victim that would prevent her from mediating effectively. Maybe the victim filed charges against her abuser and moved out, seeking counseling.

44 Lerman, supra note 1, at 73 (“The disagreement between mediation advocates and the law enforcement advocates centers on the questions of what constitutes serious violence, and which situations are so imbued with coercion that mediation cannot be a fair remedy for the weaker party.”). Jane C. Murphy and Robert Rubinson distinguish cases involving a “culture of battering” as those which should not be mediated rather than referring to the “seriousness” of the domestic violence. Murphy & Rubinson, supra note 10, at 58. They define “culture of battering” as “a systematic pattern of control and domination characterized by forms of physical, emotional, sexual, familial, and/or financial abuse.” Id.
45 Lerman, supra note 1, at 76.
46 Id. at 102.
She may be fully capable of protecting her own interests in mediation, depending on the circumstances.

In contrast, one could imagine a case where the physical injuries from the abuse were very slight or even nonexistent but the psychological effect on the victim was very significant because of the repetitive nature of the abuse. Maybe the abuser has consistently belittled his spouse and threatened her over the course of the years of their relationship, pinching her and slapping her when she has displeased him but never injuring her in such a way that she needed medical attention. Depending on individual circumstances, the victim from this second scenario could potentially be much less capable of mediating effectively than the victim from the case involving the one incident resulting in serious physical injury. What this discussion of “serious” domestic violence really illustrates is the importance of evaluating whether couples should mediate on a case-by-case basis.

Context also matters. Some scholars argue that, even where there is a history of “serious” domestic violence, there may be some cases that are still appropriate for mediation based on the timing of past incidents and other contexts.\footnote{See, e.g., Zaher, \textit{supra} note 1, at 42; Chandler, \textit{supra} note 1, at 334-36; Frederick, \textit{supra} note 18, at 524-25.} For example, Sandra Zaher has argued that categorical exclusion of cases involving domestic violence from mediation would deprive “those women who make a free and informed choice to use a convenient and inexpensive service … of that choice.”\footnote{Zaher, \textit{supra} note 1, at 42.} In contrast to some feminist critiques of mediation in this context,\footnote{See, e.g., Krieger, \textit{supra} note 1, at 245-248; Alison E. Gerencser, \textit{Family Mediation: Screening for Domestic Abuse}, 23 Fla. St. U. L. REV. 43 (1995); Dianna Post, \textit{Mediation Can Make Bad Worse}, NAT’L L.J., June 8, 1992, at 1; Susan L. Pollet, \textit{Mediating Domestic Violence: A Potentially Dangerous Tool}, 77 N.Y. ST. B.J. 41 (2005); Mary Pat Treuthart, \textit{In Harm’s Way? Family Mediation and the Role of the}}
women who are capable of comprehending the mediation process, who understand the alternatives, and who are no longer adversely affected by the violence of their partners, and who therefore are capable of voicing their own rights and interests, as well as those of their children."50 How the past violence has affected the victim is a determining factor in whether he or she could effectively mediate.51

David Chandler observes that whether or not a victim can effectively mediate with her abuser may depend on individual circumstances.52 Some women, although victims of domestic violence, have strong support systems in place that can help them negotiate through the process, and those women may be able to benefit from mediations.53 Other women, whose experiences with abuse are too recent or who do not have those types of support systems in place, may be further harmed by power imbalances that emerge during the mediation.54 Timing may be important in determining whether a victim can effectively mediate—over time, participation in victim counseling might provide the victim with the tools necessary to be able to successfully mediate family law issues.55 Comparing the mediation agreements reached by couples who had a history of domestic violence with those who did not, Chandler determined that pre-

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50 Zaher, _supra_ note 1, at 42.
51 _Id._; Frederick, _supra_ note 18, at 524-25.
52 Chandler, _supra_ note 1, at 335-36.
53 _Id._ at 335.
54 _Id._ at 334-35.
55 _Id._ at 335.

mediation screening was effective in determining which cases could be effectively mediated.\textsuperscript{56} 

What this discussion of the challenges of defining “domestic violence” for purposes of family law mediations suggests is the true value in considering whether parties are capable of mediating on a case-by-case basis. Rigid definitions do not take into account the subtle variations in individual circumstances that could be a factor in whether a couple is capable of mediating their differences and could lead to broad-scale inclusion of cases that should not be mediated or exclusion of cases that really could be successfully mediated. At the same time, the debate over how to define domestic violence also emphasizes the importance of having well-developed screening protocols and well-trained mediators in these situations—if programs are going to consider the appropriateness of mediation on a case-by-case basis, the mediator or screener must have a significant understanding of the complexity of domestic violence issues and an ability to make determinations about which cases can be safely, effectively, and fairly mediated.

B. Concerns About the Mediation Process When the Parties Have a History of Domestic Violence

Both mediation advocates and victims’ advocates have significant concerns about the mediation process where the parties have a history of domestic violence. Although the mediation process is designed to manage the power imbalances that often exist in mediations, a history of domestic violence has the potential to create insurmountable

\textsuperscript{56} \textit{Id.} at 344-45.
power imbalances. In fact, an abuser may use intimidation, i.e., either verbal or nonverbal threats of future violence, as a way to create power imbalances that act to his or her advantage. Even without actual threats, a victim may feel intimidated to the point that he or she feels incapable of standing up for his or her interests in the mediation.

In addition, one hopes that parties voluntarily participate in mediations. However, some states require parties to mediate family law issues, and not all provide exceptions for cases with a history of domestic violence. Even if victims can “opt out” of mediation, many victims’ advocates are concerned that victims feel pressured to participate, thus undermining the voluntary nature of the process. Further, there are concerns about how to ensure that the mediation process is safe for victims. These issues create further challenges for mediators, who must balance their professional responsibility to remain neutral in mediations with the need to rectify power imbalances, ensure fairness, and maintain safety.

59 Fuller, supra note 58, at 946; Murphy, supra note 58; Saccuzzo, supra note 58; Grillo, supra note 3, at 1601.
60 See supra note 7.
61 See supra note 7.
62 See, e.g., Fuller, supra note 58, at 946.
63 Frederick, supra note 18, at 526; Fuller, supra note 58, at 946.
64 See Fuller, supra note 58, at 947-48; Grillo, supra note 3, at 1592.
1. The Potential for Power Imbalances and Concerns About Intimidation

Some victims’ rights advocates argue that it is never appropriate to mediate a family law dispute, such as divorce, division of property, or child custody, where there is a history of domestic violence. These advocates argue that mediation places the victim in an impossible situation where he or she is more likely to feel pressured and, because of unequal bargaining power, end up with an agreement that does not protect his or her interests. The assumption is that those power imbalances lead to results in mediation that would not have happened in an adversarial setting.

Barbara J. Hart argues that mediation of child custody disputes should not be mandatory in situations where the woman has been battered. Because battered women do not feel like they have power in the abusive relationship, Hart argues that they are likely to not be strong advocates for themselves in custody mediations and end up with an agreement that puts both themselves and their children in further danger. Other scholars have also voiced serious concerns about the power imbalances that can exist in a mediation where there has been domestic violence and believe that mediation is often not appropriate, or at least should be handled very carefully, in that context.

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65 Bryan, supra note 2; Lerman, supra note 1; Gagnon, supra note 2; Hart, supra note 1; Grillo, supra note 3. A good overview of the various arguments against the use of mediation in cases involving domestic violence can be found in Rene L. Rimelspach, Mediating Family Disputes in a World With Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program, 17 OHIO ST. J. ON DISP. RESOL. 95, 96-99 (2001).
66 Lerman, supra note 1; Bryan, supra note 2; Gagnon, supra note 2; Hart, supra note 1; Grillo, supra note 3.
67 Buel, supra note 20, at 731. But see Edwards, supra note 6, at 663 (disputing argument that the adversarial process is more “fair” for domestic violence victims and arguing that the intimidating effect of going to court could be just as negative, if not more so, than going to mediation).
68 Hart, supra note 1.
69 Id. at 317.
70 Fischer, Vidmar, & Ellis, supra note 1; Saccuzzo, supra note 58, at 432-35; Buel, supra note 20, at 731 (“The extraordinary power imbalance and the batterer’s refusal to negotiate in good faith usually sabotage
has observed, “one can [not] expect a victim of abuse to voluntarily want or be able to sit safely at the negotiating table with their abusive partner.”\textsuperscript{71} The victim is inclined to give in on issues that she should not give in to because she wants to get out of the room as quickly as possible or because she fears retaliation if she stands up to her abuser.\textsuperscript{72}

Mediators are always concerned about the potential for unfair power imbalances in mediation and seek to create an environment in which parties who do not have as much power can have their interests met through the process.\textsuperscript{73} In the case of family mediations where there is a history of domestic violence, programs have done much to address the potential problem with power imbalances.\textsuperscript{74} Studies that have looked at mediation outcomes in this context provide limited, conflicting data about whether such efforts have been successful, pointing to a need for further studies on the subject.\textsuperscript{75}

2. Can Mediation In this Context Really Be Voluntary?

One of the underlying principles of mediation is that it is a voluntary process that can be terminated by any participant at any time.\textsuperscript{76} As discussed previously, some states, even well-intentioned mediations. In too many cases victims have lost custody of their children, marital property, and other rights to which they were entitled.”); Fuller, \textit{supra} note 58, at 947 (Fuller observes that “[t]he dynamics of domestic violence are such that the abuse can be continuing in the mediation right in front of the attorneys and the mediator,” in the form of “meaningful looks” and short, innocuous references to past threats.); Grillo, \textit{supra} note 3, at 1601.\textsuperscript{71} Pate, \textit{supra} note 2, at 17 (“Abuse victims have been belittled and demeaned for expressing their needs. They will likely be fearful of expressing their opinions, expecting retribution from the abusive partner. A victim of abuse will not be ‘empowered’ by mediation, but will rather view it as one more tactic by the batterer to continue their control.”)\textsuperscript{72} Hart, \textit{supra} note 1, at 317. This concern about mediation process is closely related to the concern about mediation outcome, discussed more fully \textit{infra} at Part IIC.\textsuperscript{73} See, \textit{e.g.}, Fuller, \textit{supra} note 58, at 947-48.\textsuperscript{74} See \textit{infra} Part IIIB.\textsuperscript{75} Frederick, \textit{supra} note 18, at 526.\textsuperscript{76} Fuller, \textit{supra} note 58, at 947-48.
however, mandate mediation in family law cases.\textsuperscript{77} States like California do not have an exception for cases involving domestic violence, meaning that even where the parties have such a history they will still be referred to mediation.\textsuperscript{78} Regardless of whether mediation is mandatory or not, there are some scholars and victims’ advocates who believe that there is no voluntary participation in mediation for a victim of domestic violence.\textsuperscript{79} They observe that victims may feel that they cannot refuse to mediate because of either pressure from the court or from the abuser.\textsuperscript{80} Victims’ advocates also believe that the process cannot be viewed as voluntary when the victim is intimidated to accept an agreement during a mediation that is not in her best interests, because of force or manipulation.\textsuperscript{81} Mandatory mediation does not mean mandatory settlement, but victims’ advocates are concerned that power imbalances and fears of future violence may lead victims to believe that they have no choice but to agree to their abusers’ demands.\textsuperscript{82}

3. Safety: The Potential for Violence During Mediation

Even assuming that appropriate screening filters out the vast majority of cases that should not be mediated, it does not mean that mediators can feel assured of the victim’s safety both during and after the mediation takes place.\textsuperscript{83} As a couple moves through the

\begin{itemize}
\item \textsuperscript{77} California is one state that has mandatory mediation for family law cases, without a domestic violence exception. See Cal. Fam. Code §§ 3170, 3181, & 3182 (2007).
\item \textsuperscript{78} For discussion of California’s mandatory mediation programs, see Grillo, supra note 3.
\item \textsuperscript{79} Hart, supra note 1, at 317; Fuller, supra note 58, at 946.
\item \textsuperscript{80} Fuller, supra note 58, at 946.
\item \textsuperscript{81} Id. (“Obviously, someone who feels forced or manipulated into the process and/or outcome is not participating voluntarily.”); Buel, supra note 20, at 731.
\item \textsuperscript{82} Hart, supra note 1, at 317; Fuller, supra note 58, at 946
\item \textsuperscript{83} Frederick, supra note 18, at 526; Fuller, supra note 58, at 947.
\end{itemize}
mediation process or other legal proceedings, the situation could quickly change. There may be subtle indicators—or sometimes overt signs—that the abuser is still intimidating the victim to get what he or she wants from the mediation, and if the mediator is not vigilant he or she will miss those signals. Rather than viewing screening as a one-time process, one scholar has argued that the mediator needs to think of screening as ongoing. In addition, there are many ways to approach the mediation process in order to reduce the potential threat of violence either during or immediately after a mediation session, including shuttle mediation, caucusing, and telephone mediation.

4. Concerns About Mediator Neutrality

Another potential problem in mediations with parties who have a history of domestic violence is mediator neutrality. In theory, what makes mediation unique—and therefore effective—is the fact that a neutral third party acts as a facilitator for the process of negotiating a settlement. But in mediations where the participants have a history of domestic violence, the mediator is tasked with managing power imbalances and remaining vigilant against threats, intimidation, and potential violence. As one scholar has observed, this can be a delicate, difficult balance for the mediator to maintain:

If a mediator is truly going to balance the bargaining power differential, the mediator may have to compromise her neutrality, at least in the eyes of the batterer. It is quite difficult to remain neutral when the mediator has to work to protect the rights of one of the parties. And if the mediator

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84 Frederick, supra note 18, at 526.
85 Frederick, supra note 18, at 526; Fuller, supra note 58, at 947.
86 Frederick, supra note 18, at 526. See also Model Standards of Practice for Divorce and Family Mediators, supra note 26, at 120 (Standard XI.C) (discussing need for screening for domestic violence both prior to and during the mediation process).
87 These approaches to the mediation process are discussed more fully at infra Part IIIIB.
88 Fuller, supra note 58, at 947-48.
attempts to ignore or fails to give credence to the allegations of abuse, the victim may feel that the mediator is on the abuser’s side, destroying the victim’s belief that the mediator is neutral.\footnote{Id.}

Another scholar agrees that mediator neutrality can be almost impossible to maintain in the face of power imbalances, even when there is no history of domestic violence: “When a mediator analyzes and attempts to correct a power imbalance, she can no longer claim to be simply a facilitator of the couple’s process; rather, she is taking an active role in affecting the outcome of that process.”\footnote{Grillo, supra note 3, at 1592.} How does the mediator maintain neutrality while at the same time ensuring safety, managing power imbalances, and encouraging fair settlements? Programs have taken a variety of approaches to this challenge,\footnote{See, e.g., Model Standards of Practice for Divorce and Family Mediators, supra note 26, at 116, 120 (Standards VI, XI) (establishing need for mediator impartiality in one standard but in another standard establishing appropriate steps that mediators should taken in “a family situation involving domestic violence” that may or may not allow the mediator to remain neutral).} but more needs to be done to assess their effectiveness.

Some victims’ advocates take a more extreme stance about the role that the mediator should play in these mediations, arguing that the mediator should not really be neutral at all—instead, the mediator should be responsible for ensuring that the victim gets a fair settlement.\footnote{See, e.g., Lerman, supra note 1.} One of the problems with this approach is that it puts the mediator in a difficult position. On the one hand, one can see the obvious benefits of focusing on the needs of the victim of violence in mediations, but at the same time the mediator no longer functions as a neutral in the mediation.\footnote{Fuller, supra note 58, at 947-48.}

In addition, one scholar advocates the mediator being the monitor of whether or not the abuser complies with the agreement afterwards.\footnote{Lerman, supra note 1, at 109.} That approach to mediation
would place so many responsibilities on mediators that it might be difficult to find mediators willing to take on these responsibilities. First, there would be concerns that such requirements might create a standard of care for mediators that would open them up to a lawsuit for negligence or mediator malpractice. In addition, having to monitor whether an abuser is complying with an agreement puts an additional burden on the mediator and might place the mediator, as well as the victim, in an unsafe position. Finally, such high expectations of the mediator’s role in the process would put a lot of stress on mediators who might worry that they would not perform their role well. As a result of these potential issues, programs have not usually placed such responsibilities on the mediator, but mediators still struggle with how to remain neutral in this context.95

C. Concerns About How a History of Domestic Violence Might Affect Mediation Outcomes

Because of the potential for problems with the mediation process that relate to a couple’s history of domestic violence, there are also concerns about mediation outcomes in this context. If the couple is able to come to an agreement as a result of the mediation, that agreement may not reflect the needs or legal rights of the victim.96 Victims may be so intimidated by their abusers in the mediation that they end up with unfair agreements.97 Additionally, victims’ advocates are concerned that either the mediation or the agreement could increase the chance for further violence.98

95 Fuller, supra note 58, 947-48.
96 Buel, supra note 20, at 731.
97 Grillo, supra note 3, at 1601-02.
98 Lerman, supra note 1; Dunnigan, supra note 14, at 1052; Boxer-Macomber, supra note 14, at 896.
1. Fairness of Agreements

Victims’ advocates and feminist scholars have also expressed concerns that a history of domestic violence can so taint a mediation session that any agreement arrived at is likely to be unfair to the victim.\footnote{Buel, supra note 20, at 731 (“In too many cases victims have lost custody of their children, marital property, and other rights to which they are entitled.”). See also Grillo, supra note 3, at 1601-02; Fuller, supra note 58, at 946, 947.} For example, Sarah Buel has argued that “[t]hreats made prior to the session, or one look inside, can force victims to give up rights and remedies to which they are entitled, in exchange for the illusion of safety.”\footnote{Buel, supra note 20, at 731.}

In addition, it may be difficult in a particular situation to determine what a “fair” agreement is. Trina Grillo has observed that a mediator’s own personal beliefs about “fairness” have the potential to color the outcomes of mediations.\footnote{Grillo, supra note 3, at 1592-93.} Among possible definitions of a fair agreement, as Grillo lays them out, is “one that closely resembles what the court would have ordered had the case gone to trial.”\footnote{Id. at 1593.} Other mediators “look for an intuitive conception of fairness shared by the parties and, at least to a limited extent, by the mediator.”\footnote{Id.} Grillo recognizes the difficulties inherent in this latter definition, as the parties—as well as the mediator—may have differing concepts of fairness.\footnote{Id.} A third approach uses “law not primarily as a set of necessary applied rules, but providing a relevant reference point, both in terms of a practical alternative and as an expression of societal norms and, perhaps, some underlying principles.”\footnote{Id. (quoting CENTER FOR DEVELOPMENT OF MEDIATION IN THE LAW, THE PLACE OF LAW IN MEDIATION 1 (Aug. 1983) (training materials)).} What the
range of definitions of “fairness” reflects is the difficulty of determining what is actually a “fair” outcome of mediation—“fairness” may be in the eye of the beholder.

2. Potential for Future Violence

One concern about mediating cases where the couple has a history of domestic violence is whether the mediation process has the potential to exacerbate or escalate the potential for future violence.\textsuperscript{106} Some victims’ advocates believe that, as a result of participating in mediation, the victim has a much greater chance of being battered again in the future.\textsuperscript{107} Others feel that the risk of future violence is no greater in mediation than it is in the adversarial process, and may in fact be less.\textsuperscript{108}

Victims’ rights advocates who oppose mediation where domestic violence is at issue are often advocates of the law enforcement model. As described by one scholar, “the law enforcement model advocates formal legal action combined with punishment or rehabilitation of wife abusers,” in order to “ensure the safety of the victim and to give the abuser a clear message that society will not tolerate his continued violence against his mate.”\textsuperscript{109} Law enforcement model advocates argue that the only way to prevent future domestic violence is to use legal processes, such as criminal prosecution of the abuser

\textsuperscript{106} See, e.g., Lerman, \textit{supra} note 1; Dunnigan, \textit{supra} note 14, at 1052; Boxer-Macomber, \textit{supra} note 14, at 896.

\textsuperscript{107} Lerman, \textit{supra} note 1; Dunnigan, \textit{supra} note 14, at 1052 (“Research has found that battered women are more likely to be abused after mediation than after a formal trial.”).

\textsuperscript{108} See, e.g., Boxer-Macomber, \textit{supra} note 14, at 896.

\textsuperscript{109} Lerman, \textit{supra} note 1, at 70.
and civil protection orders for the victims. They believe that the only way to protect the victim is by prosecuting the abuser.

It is undisputable that mediators, mediation program administrators, and court personnel need to be aware of the potential for future violence. One way to reduce the potential for future violence is to focus on the mediation process and train mediators in how to handle the dynamics of family law mediations in this context. Through screening, it seems likely that the more volatile cases that really have a significant threat of future violence would not be scheduled for mediation.

D. Public Policy Concerns

Scholars and victims’ advocates are divided about the potential public policy implications of mediating family law cases where there is a history of domestic violence. Some domestic violence victims’ advocates argue that mediation, as a matter of public policy, sends the wrong message about domestic violence. They argue that, because domestic violence does not require the abuser to take responsibility for the abusive acts, it

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110 See, e.g., Sherman & Berk, supra note 10. But see Alexandra Pavlidakis, Comment, Mandatory Arrest: Past Its Prime, 49 SANTA CLARA L. REV. 1201 (2009) (arguing that mandatory arrest laws are ineffective, potentially increase the potential for future violence, result in the increased chance of victims who fight back also being arrested, and have a chilling effect on the victims).
111 Lerman, supra note 1, at 61; Sherman & Berk, supra note 10. Stephen J. Schulhofer also discusses the Sherman and Berk study, completed in Minneapolis, Minnesota, in the 1980s, in which the results supported the argument that mandatory arrest was the best solution for dealing with domestic violence incidents, significantly reducing recidivism. Stephen J. Schulhofer, The Feminist Challenge in Criminal Law, 143 U. PA. L. REV. 2151, 2162 (1995). After this study was published, more and more police departments adopted mandatory arrest policies for responses to domestic violence calls. Id. Although feminists originally supported mandatory arrest policies for abusers, they later began to question whether the long-term results of such policies were as beneficial as originally thought. Aya Gruber, The Feminist War on Crime, 92 IOWA L. REV. 741, 802-03 (2007).
112 See generally infra Part III.
113 See infra Part IIIA1.
114 Fuller, supra note 58, at 946.
“sends a message to both the participants and to society in general that domestic violence is either tolerable, or that both parties are responsible for domestic violence.” Others stress the potential positive effects of mediation for the victims, and the possibility that mediation may empower those women to have more of a voice in what happens to their future.

1. Mediation May Put Domestic Violence “In the Shadows”

Because mediation is a private process, victims’ advocates are concerned that mediation has the potential to hide domestic violence in the shadows, where it will not be addressed, and creates more potential for violence against the victim in the future. As a result, the law enforcement model does not contemplate using mediation to solve family disputes involving domestic violence, because critics feel that mediation “covers up” potential violence and potentially re-victimizes the victims.

115 Id.
116 See, e.g., Edwards, Baron, & Ferrick, supra note 6, at 587; Edwards, supra note 6, at 665; Zaher, supra note 1, at 41; Rimelspach, supra note 65, at 102.
117 Krieger, supra note 1, at 240-41; Loomis, supra note 1, at 367; Woods, supra note 1. But see Rimelspach, supra note 65, at 102 (“In response to the argument that the mediation process protects batterers from legal sanctions and in turn fails to treat battering as a crime, it can be argued that mediation actually encourages participants to seek outside help. … Mediation … provides batterers and their spouses the opportunity to address the violence in a way that enables them to devise safety mechanisms. The mediation process, unlike traditional litigation, encourages the participants to create guidelines governing future relations.”); Murphy & Rubinson, supra note 10, at 66 n.76 (“The availability of criminal proceedings mitigates concerns of some scholars that in addition to power imbalances, mediation fosters a ‘private’ resolution of a problem that many women’s advocates have long sought to bring out of the ‘private’ realm and into public consciousness and condemnation.”).
118 Lerman, supra note 1, at 61. See also Anne E. Menard & Anthony J. Salius, Judicial Response to Family Violence: The Importance of Message, 7 MEDIATION Q. 293, 299 (1990) (In mediation, “the message of offender accountability for his use of violence becomes blurred.”); Joanne Fuller & Rose Mary Lyons, Mediation Guidelines, 33 WILLAMETTE L. REV. 905, 911 (1997) (“[M]erely allowing batterers to negotiate with their victims undermines the criminal justice system’s message to batterers that their conduct is illegal and wrong.”).
Probably the article most cited for arguing against mediation in the context of domestic violence is Lisa G. Lerman’s *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*.\textsuperscript{119} Lerman, a supporter of the law enforcement model, argues that cases involving domestic violence are never appropriate for mediation and instead should be referred to the courts.\textsuperscript{120} Lerman focuses on cases where women are seeking help with domestic violence issues specifically and are directed into mediation as a way to resolve their problems.\textsuperscript{121} She believes that mediators avoided dealing with the issue of violence in those mediations, preferring to focus on issues that are simpler to resolve, such as “visitation schedules, financial problems, or time spent with other friends or lovers.”\textsuperscript{122} Because mediators usually focused on the issues that were easiest to negotiate, mediation agreements tended to address these subsidiary issues rather than addressing the larger issue of domestic violence.\textsuperscript{123} In addition, Lerman believes that many mediators view the victims as partially to blame for the violence targeted towards them, thus skewing the mediation even further by encouraging women to accept part of the responsibility for the violence.\textsuperscript{124}

The real question is whether Lerman’s assumptions hold true in situations where abused women enter into the mediation process for other reasons, for example, to resolve child custody issues or issues related to separation or divorce. Does mediation always have the kind of impact that she assumes it does in these types of situations? Does proper

\textsuperscript{119} Lerman, *supra* note 1.
\textsuperscript{120} Id. at 61, 70.
\textsuperscript{121} Id. at 84.
\textsuperscript{122} Id. See also Buel, *supra* note 20, at 731 (“Mediators have often said, “We will deal with custody, visitation, and property division issues right now and will not discuss the abuse.””).
\textsuperscript{123} Id. Lerman relies on training materials for a workshop for mental health professionals for this information. It does not appear that this conclusion was based on empirical data. See id. at 84, n.124 (citing A. Ganley, *Court-Mandated Counseling for Men Who Batter: A Three-Day Workshop for Mental Health Professionals—Participant’s Manual* 28 (1981)).
\textsuperscript{124} Lerman, *supra* note 1, at 86, 96.
training of mediators help to ensure that the problems that Lerman views within mediation in this context result in a different type of outcome? Or, has even the passage of time made enough difference in public perceptions of domestic violence that what was true when Lerman voiced her initial criticism in 1984 is no longer the case in 2010?

2. Can Mediation Empower Domestic Violence Victims?

In direct contrast to the preceding view, some mediation advocates argue that the mediation process has the potential to empower victims of domestic violence, giving them the tools that they need to create agreements that support their interests and enhance their safety, rather than further victimizing them. Sandra Zaher has explained that “mediation can empower the powerless by enabling them to speak in their own voice and assert their own interests, perhaps for the first time.” Supporters of this view stress the necessity of having quality mediators involved in a mediation process that safeguard’s victims’ interests and physical safety. In fact, John Haynes, the founding president of the Academy of Family Mediators, has argued that mediation can encourage the victim (and the abuser as well) “to focus … on where they are going in their lives as separate, whole, independent people.” Some authors have found that such a process can have

125 See, e.g., Edwards, Baron, & Ferrick, supra note 6, at 587; Edwards, supra note 6, at 665; SUSAN SCHECHETER & JEFFREY L. EDELSON, EFFECTIVE INTERVENTION, IN DOMESTIC VIOLENCE & CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PRACTICE 42, available at http://childrensprogram.org/media/pdf/green_book.pdf. (“[W]here mediation is mandated or permitted, if it is conducted in accordance with the guidelines described in this section, the process can effectively empower victims of violence and enhance their safety as well as the safety of their children and other family members”); Zaher, supra note 1, at 41; Rimelspach, supra note 65, at 102.
126 Zaher, supra note 1, at 41.
127 Edwards, Baron, & Ferrick, supra note 6, at 586-87; Zaher, supra note 1, at 41.
128 John Haynes, Advanced training presented at the 6th annual conference of the Academy of Family Mediators, Breckenridge, CO, July 1989, as discussed in Corcoran & Melamed, supra note 5, at 313.
the effect of empowering the victim in the mediation, rather than solely defining them as someone who has been abused.\textsuperscript{129}

Of course, not all victim’s advocates and scholars agree that mediation can empower victims of domestic violence. Tina Grillo agrees generally that mediation has the ability to empower participants by “permit[ing] persons to speak for themselves and make their own decisions,” but not when there is a history of domestic violence.\textsuperscript{130} Instead of being empowering, Grillo argues that mediation “would surely be psychologically traumatizing” for a woman to be in a “direct confrontation with [an abusive] husband, with the safety of herself and her children at stake.”\textsuperscript{131}

\textbf{III. APPROACHES TO MEDIATION PROGRAM DESIGN TO ADDRESS CONCERNS ABOUT DOMESTIC VIOLENCE}

Mediation programs have taken into account many, if not all, of the preceding considerations in their design of mediator training programs, screening protocols, mediation program policies, and approaches to mediations where couples have a history of domestic violence. As a result, many scholars and mediation advocates today believe that mediation can be an effective way to resolve family disputes regarding issues such as divorce proceedings, property allocation, and child custody, even when the parties have a history of domestic violence.\textsuperscript{132} The following section analyzes some of the approaches to addressing the potential challenges for mediating in this context.

\textsuperscript{129} Corcoran & Melamed, \textit{supra} note 5, at 313.
\textsuperscript{130} Grillo, \textit{supra} note 3, at 1581, 1601.
\textsuperscript{131} Id. at 1601.
\textsuperscript{132} See, e.g., Zaher, \textit{supra} note 1, at 42; Maxwell, \textit{supra} note 12, at 337; Chandler, \textit{supra} note 1; Salem & Dunford-Jackson, \textit{supra} note 5, at 437; Edwards & Baron, \textit{supra} note 5, at 596; Bigornia, \textit{supra} note 5, at 60-61; Schepard, \textit{supra} note 5, at 421; Corcoran & Melamed, \textit{supra} note 5, at 303; Edwards, \textit{supra} note 6, at 661-62, 663; Ver Steegh & Dalton, \textit{Report from the Wingspread Conference}, \textit{supra} note 19.
A. Approaches to Family Mediation Program Design: Pre-Mediation

1. Screening

In response to concerns about inappropriate cases, i.e., cases involving domestic violence, making their way into the mediation process, most mediation programs have developed screening protocols to ensure that cases are appropriate for mediation. Screening can involve written questionnaires and/or interviews, and its purpose is to determine whether there has been domestic violence in the relationship that could interfere with the effectiveness of the mediation process, make the process unfair, or be unsafe for domestic violence victims. The Model Code, the Model Standards, and the American Law Institute all require screening of possible family conflict mediation cases for a history of domestic violence, although they do not mandate a particular approach to screening.

Screening requires a thoughtful and careful approach, and the screening process must be confidential. Many victims of domestic violence are reluctant to disclose the

133 Lerman, supra note 1, at 93; Chandler, supra note 1; Gerencser, supra note 49; Edwards, supra note 6, at 662; Ver Steegh & Dalton, Report from the Wingspread Conference, supra note 21, at 460-61; Ver Steegh, Yes, No, and Maybe, supra note 1, at 194. 
134 Ver Steegh, Yes, No, and Maybe, supra note 1, at 194; Ver Steegh & Dalton, Report from the Wingspread Conference, supra note 19, at 460-61. 
135 Chandler, supra note 1, at 331, 345. 
136 Ver Steegh, Yes, No, and Maybe, supra note 1, at 194. See also Model Standards of Practice for Divorce and Family Mediators, supra note 26, at 120 (Standard XI.C) (“A mediator should make a reasonable effort to screen for the existence of domestic violence prior to entering into an agreement to mediate with the parties.”). 
137 Murphy & Robinson, supra note 10; Chance & Gerencser, supra note 54, at 54; Pearson, supra note 10, at 325; Rimelspach, supra note 65, at 104-05.
violent acts, so screeners must ask questions that go beyond the surface level.\textsuperscript{138} Screeners must be flexible in how they ask questions to anticipate potential problems with mediation, and screening must occur in a private place that allows victims to feel safe during the screening process.\textsuperscript{139}

Screening programs have come a long way in the past couple of decades. In the early 1980s, there were mediation scholars who advocated screening to determine whether cases involving domestic violence were appropriate for mediation,\textsuperscript{140} but Lerman criticized screening because she felt that “screening standards are often amorphous and are not consistently applied.”\textsuperscript{141} In particular, Lerman criticized Bethel and Singer who, rather than developing specific guidelines for screening, instead stated vague recommendations that “‘[w]hatever case intake method is used must provide careful screening of complaints. Those cases suitable for mediation should be identified and preserved, and others should be referred to appropriate legal or social agencies.’”\textsuperscript{142} She argued that screening of potential parties for mediation should be much more careful in the context of domestic violence, and more carefully defined, specific criteria should be used to determine whether mediation is appropriate.\textsuperscript{143} At the outset, the screening process should include questions about potential past violence in disputes between couples or family members.\textsuperscript{144} In addition, Lerman believes that those screening for mediation appropriateness should make clear to alleged domestic violence victims that

\textsuperscript{138} Pate, supra note 2, at 17; Edwards, supra note 6, at 665.
\textsuperscript{139} Pate, supra note 2, at 17. Rimelspach, supra note 65, at 104-05.
\textsuperscript{140} Lerman, supra note 1, at 93, n.172. See also Gerencser, supra note 49, at 43.
\textsuperscript{141} Lerman, supra note 1, at 93.
\textsuperscript{142} Lerman, supra note 1, at 93, n.172.
\textsuperscript{143} Lerman, supra note 1, at 100-01. See also Gerencser, supra note 49.
\textsuperscript{144} Lerman, supra note 1, at 101-02.
there are other alternatives to mediation. In general, it seems that the vast majority of screening processes today have heeded Lerman’s concerns about the need to determine whether domestic violence currently is or has been present in the relationship, although fewer screeners may notify alleged victims of other alternatives to mediation.

There are many debates over what approach to take to the screening process. For example, many mediation programs use a written questionnaire to screen for domestic violence, while others use oral screening of the parties. Some experts argue that a combination of approaches is more effective than choosing just one, as every situation is a little bit different, and it can be difficult to pick up on clues of domestic violence. It is also important that screeners pay attention to non-verbal cues and do not just rely on what the interviewee says. Current practice is varied—states approach screening in a variety of ways, if they require formal screening processes at all. Although approximately eighty percent of mediation programs screen for domestic violence, half of those who screen only use written questionnaires.

145 Lerman, supra note 1, at 102, 103.
147 Ver Steegh, Yes, No, and Maybe, supra note 1, at 194.
148 Ver Steegh, Yes, No, and Maybe, supra note 1, at 194.
149 Maxwell, supra note 12, at 345.
150 See, e.g., 17B A.R.S. Rules Fam. Law Proc., Rule 68(B) (“Unless the parties agree to mediation by a private mediator, the court or conciliation services shall determine whether mediation or ADR services are appropriate in a particular case. The court or conciliation services may deem mediation inappropriate for reasons such as parental unfitness, substance abuse, mental incapacity, domestic violence, or other good cause.”); Oregon Rev. Stat. § 107.755(1)(d)(C)(i) (“All mediation programs must develop and implement … A screening and ongoing evaluation process of domestic violence issues for all mediation cases”); Tenn. Sup. Ct. Rules, Rule 31, § 17(b)(1)(D) (requiring mediators to have at least four hours training in domestic violence issues and screening techniques). Most states do not have statutes or statewide rules requiring screening for domestic violence before couples are referred to mediation.
151 Ver Steegh, Yes, No, and Maybe, supra note 1, at 194.
The next issue is what types of questions should be included in the screening process. One questionnaire started with the basic question, “Was abuse present in the marriage relationship?” If the party answered “Yes” to that first question, then the questionnaire asked them to check the box of the type of abuse that was present. Another screening program required the screener to ask the party, “Would you tell me if you have been physically abused by your husband during your relationship?” If the person admitted that abuse had taken place, the interviewer followed up with questions about the last abusive incident, fears of future abuse, and whether the woman felt “that the abuse has limited her ability to communicate ‘on an equal basis’ with her spouse.”

Often, screening focuses solely on women. By assuming that only men are abusers and only women are victims, screening programs may miss other instances of domestic violence, such as where the man may be the victim or where the parties involved in the mediation process are same-sex domestic partners. In addition, screening programs that focus solely on past physical violence may miss other types of abuse such as verbal threats and intimidation, psychological abuse, and economic control over the other person.

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152 Fischer, Vidmar, & Ellis, supra note 1, at 2155.
153 Fischer, Vidmar, & Ellis, supra note 1, at 2155.
154 Fischer, Vidmar, & Ellis, supra note 1, at 2155.
155 Fischer, Vidmar, & Ellis, supra note 1, at 2155. See also Chandler, supra note 1, at 336.
156 Chandler, supra note 1, at 336.
157 Ver Steegh & Dalton, Report from the Wingspread Conference, supra note 19, at 460-61; Buel, supra note 20, at 729 (noting that “financial abuse is quite common, yet may not be readily apparent, apparent, unless the [screener] asks discerning questions and knows which behaviors may be indicative of coercion”).
On the opposite end of the screening spectrum is the Conflict Assessment Protocol.\textsuperscript{158} Also completed through an interview process, the Conflict Assessment Protocol has several components:

First, the Conflict Assessment Protocol probes for the couple’s decision-making patterns, resolution of conflicts in the relationship, and expressions of anger. The purpose of this section of the protocol is for mediators to be “attuned to the issue of control.” The second section of the interview proceeds through a series of questions designed to elicit acknowledgment of specific abusive behaviors. Based on the Conflict Tactics Scale used in domestic violence research, the questions about abuse tap into emotional, sexual, and physical domains. The interview closes with specific questions about control, jealousy, child abuse, and substance use. Each of these questions is asked of each spouse in an individual session, but phrased in terms of whether either partner has abused the other.\textsuperscript{159}

Because the Conflict Assessment Protocol has numerous layers and asks broad questions that go beyond obvious questions about domestic violence, it may be more effective in unearthing past histories of domestic violence and accumulating the information that would be necessary for a screener to determine whether the parties can mediate safely and effectively. On the other hand, not all mediation programs may have sufficient resources—including staff, private screening spaces, and even time—to make effective use of such an extensive screening protocol.

Another example of a more nuanced approach to screening is Desmond Ellis and Noreen Stuckless’s Domestic Violence Evaluation, known as “DOVE.”\textsuperscript{160} Having completed extensive quantitative research into how a history of domestic violence or abuse translates into the potential for further violence after litigation or mediation, Ellis

\begin{footnotes}
\item[159] Fischer, Vidmar, & Ellis, supra note 1, at 2156 (internal citations omitted).
\item[160] Ellis & Stuckless, supra note 20, at 658.
\end{footnotes}
and Stuckless created a nineteen-item screening process to identify risks for violence and the appropriate approach to managing those risks.\textsuperscript{161} The screening process’s focus is on predicting the potential for future abuse, not necessarily determining whether a victim is capable of mediating effectively with his or her abuser.\textsuperscript{162}

DOVE divides predictors of future violence or abuse into several categories: (1) evidence of past violence, such as assaults, serious physical injuries, sexual assaults, leaving home because of partner’s violence, and calling the police because of partner’s violence; (2) evidence of past abuse, such as emotional abuse or serious emotional injury; (3) evidence of emotional dependency, such as threats to harm or kill self or partner if partner left; (4) evidence of relationship problems, such as an inability to get along with partner, communication problems, a pattern of blaming partner for problems, or anger; (5) evidence of mental health issues, including taking medication for mental health diagnoses; (6) evidence of control, such as attempts to control partner or use of violence or abuse to control partner; and (7) evidence of alcohol or drug abuse.\textsuperscript{163} Responses to questions regarding these predictors result in a score,\textsuperscript{164} and the screener uses the score to determine what the couple’s risk category is: low, moderate, high, or very high.\textsuperscript{165} Based on the risk category, the court or mediation program then institutes a Safety Plan that is tailored to the couple’s level of risk of future violence.\textsuperscript{166}

\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id. at 660.
\textsuperscript{164} Id. at 661-62.
\textsuperscript{165} Id. at 664-65.
\textsuperscript{166} Id. at 664. For example, if a couple is determined to fit into the “low risk” category, Ellis and Stuckless recommend the following “interventions”:
1. Clearly stated written “rules of civility” that encourage respectful communications and specifically exclude coercive conduct during and between mediation sessions.
2. Parties agree in writing to terminate mediation if the mediator obtains credible evidence of threatened or actual violence and/or abuse.
2. Mediator Training

Lerman advocates that mediators be trained more extensively to recognize and deal with domestic violence issues. This argument is one that most mediation advocates agree with, regardless of their views of whether mediation should take place

3. Face-to-face mediation.
4. Referrals to appropriate treatment interventions.

*Id.*
If a couple is “moderate risk,” the following additional “interventions” are recommended:
5. Mediator carefully monitors compliance with violence/abuse prevention rules during private interviews with partners, and/or by communicating with third parties identified as trusted contact persons by partners.
6. Partners arrive and leave at different times or routes and do not wait in the same room.
7. Mediators provide both partners with a list of community resources such as shelters, men’s programs, health services, male and female support groups, and legal information.
8. Face-to-face mediation with advocate or supporter present, or shuttle mediation.
9. Referrals to appropriate treatment interventions.

*Id.*
If a couple is “high risk,” the following “interventions” are recommended:
10. Partners given safety warnings in writing.
11. Interpersonal contact only takes place in public places, or with trusted third parties present.
12. Arrange for third party to be present during exchanges or children, or third party transports children.
13. Communications only through trusted third parties or through journals exchanged with children and subject to monitoring by mediator.
14. Partners escorted to and from premises where mediation is being conducted.
15. Shuttle, telephone, or on-line mediation.
16. Referral to appropriate treatment interventions.

*Id.* at 664-65.
Finally, for “high risk” couples the following “interventions” are recommended:
17. Referral to appropriate treatment interventions.
18. Telephone or on-line mediation if referrals produce credible evidence of positive personal and/or situational change.

*Id.* at 665.

Lerman, *supra* note 1, at 110, 111 (“[M]ediators need both the skills of a legal advocate and those of a therapist. These include (1) techniques for identifying battering cases; (2) techniques for counseling victims and abusers; (3) knowledge of local laws, and of law enforcement and court practices regarding domestic violence; (4) awareness of legal, mental health, and other services for people in violent relationships; (5) awareness of collateral services, such as treatment programs for alcoholics or public benefits programs; and (6) a general understanding of political, psychological, and sociological perspectives on wife abuse.”); Maxwell, *supra* note 12, at 345.
when a couple has a history of domestic violence. One author states that “[t]raining should include understanding the dynamics of domestic violence, effectively screening parties for domestic violence, accommodating the needs of domestic violence victims in mediation and assisting victims with safety planning.” Another scholar argues that men and women generally negotiate differently from each other, and mediators must be trained to recognize, understand, and manage gender-based power differentials in mediation sessions.

Training in domestic violence issues is all the more important because mediators come from a variety of backgrounds, may not have legal training, and in some cases may have not gone through any formal training prior to becoming a mediator.

The Association of Family and Conciliation Courts has developed Model Standards of Practice for Divorce and Family Mediators. Standard II.A.2 states that an effective mediator should “be aware of the psychological impact of family conflict on parents, children, and other family members, including education and training in domestic violence … .” Standard XI.B states that “[a] mediator shall be knowledgeable about the symptoms and dynamics of domestic violence and other forms of domestic abuse and the governing laws and procedures and attend appropriate training programs on those subjects.” The standards caution that a mediator who does not have

168 See, e.g., D’Ambra & D’Ambra, supra note 8, at 38; Ver Steegh, Yes, No, and Maybe, supra note 1, at 188-90; Belzer, supra note 62, at 58; Edwards, supra note 6, at 662; Rimelspach, supra note 65, at 107.
169 Pate, supra note 2, at 17. (Pate believes that attorneys acting as mediators have an ethical obligation to obtain domestic violence training if they will be mediating family law disputes.)
170 Zaher, supra note 1, at 42.
171 Knowlton & Muhlhauser, supra note 1, at 264.
172 Model Standards of Practice for Divorce and Family Mediators, supra note 26.
173 Id. at 112.
174 Model Standards of Practice for Divorce and Family Mediators, supra note 26, at 120.
adequate training should not undertake a mediation if he or she knows there is a history of domestic violence.\textsuperscript{175}

Although the Model Standards state that mediators should be trained as mediators and have knowledge of family law and knowledge and training about how family issues can impact all members of the family, there is no specific description of what appropriate training in domestic violence issues might entail.\textsuperscript{176} In addition, although the Standards state that the mediator should not mediate a case in which there is a history of domestic violence if he or she has not gone through “adequate training,” without that training the mediator may not have the knowledge required to recognize cases that may have slipped through the screening process without being identified.\textsuperscript{177}

States have varied in their approach to mediator training requirements, both in terms of general mediation training as well as specialized training in domestic violence issues.\textsuperscript{178} For example, one survey found that only about seventy percent of mediators went through domestic violence training on a regular basis.\textsuperscript{179} California, which has mandatory mediation requirements for child custody disputes, has created statutory requirements for mediator training on domestic violence issues.\textsuperscript{180} California requires mediators to “complete sixteen hours of advanced domestic violence training within the first twelve months of employment and four hours of domestic violence training each

\textsuperscript{175} Id.
\textsuperscript{176} Id. See also Ver Steegh, Yes, No, and Maybe, supra note 1, at 189.
\textsuperscript{177} Nancy Ver Steegh notes that the American Law Institute also requires mediators to have domestic violence training. Ver Steegh, Yes, No, and Maybe, supra note 1, at 189.
\textsuperscript{178} Ver Steegh, Yes, No, and Maybe, supra note 1, at 189-90; Edwards, supra note 6, at 650 (discussing California’s requirements that mediators “participate in continuing education that covers a number of subjects, including family dynamics, substance abuse, domestic violence, child abuse, and certain aspects of custody law.”).
\textsuperscript{179} Ver Steegh, Yes, No, and Maybe, supra note 1, at 189.
\textsuperscript{180} Cal. Fam. Code § 1816.
year thereafter.”

In addition, mediator supervisors must attend training workshops on domestic violence.

The Ohio Supreme Court’s training program on Domestic Abuse Issues for Mediators and Other Professionals provides a useful example of what a training program could involve and what value it has. Ohio’s program was designed by judiciary experts, domestic violence prevention advocates, and batterers’ intervention specialists. The training takes place over two days, and it is designed to improve mediators’ skills in screening/detecting domestic abuse and their ability to “ensure voluntary, appropriate and safe mediation.” The training includes a review of Ohio’s mediation statutes and public policy concerns related to mediation; how to define domestic abuse and how to understand its dynamics; techniques for screening, terminating a mediation, and using the mediator’s power and influence to create power balances; resources available for victims of domestic violence; and relevant statutory materials related to domestic abuse and domestic violence issues.

Family mediators, without a doubt, should go through some form of domestic violence training in order to be able to recognize cases involving domestic violence and to be able to manage the mediation process in a safe and fair manner. At a minimum, that training should include education about how to recognize signs of domestic violence, the power dynamics involved in a relationship in which there is domestic violence, and the psychological effect of violence on the victim. Additionally, mediators must be trained

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181 Boxer-Macomber, supra note 14, at 893.
182 Id.
183 Chief Justice Thomas J. Moyer, letter to training participants, in SUPREME COURT OF OHIO, DOMESTIC ABUSE ISSUES, supra note 39, at I.
184 Id.
185 SUPREME COURT OF OHIO, DOMESTIC ABUSE ISSUES, supra note 39.
to properly screen for domestic violence, how to use different techniques such as caucusing to manage power imbalances, and how to plan for safety prior to, during, and after mediation sessions. Finally, mediators should receive substantive training in the legal issues associated with domestic violence and what resources are available for victims in the community. To understand more fully how much training is needed, how often mediators should be required to undergo training, and specifically what topics should be included in training sessions, there is a need to study the effectiveness of mediator training programs that already exist.

3. Attorney Training

Although the focus is usually on the need for mediator training programs, some mediators and attorneys also argue that family law attorneys need better training in order to more effectively represent domestic violence victims in mediation—and for that mater, in litigation as well.186 Most attorneys have not undergone any special training to be able to recognize when family law cases involve domestic violence. This lack of training is significant because most clients do not volunteer that information to their attorneys.187 Because those same attorneys often request that the court send their clients to mediation,

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186 Gerenscer, supra note 13, at 63-66; Chance & Gerenscer, supra note 54, at 56 (advocating that all Florida attorneys be required to take training in domestic violence, as well as arguing that judges should take mandatory training as well in appropriate screening processes); Howe & McIsaac, Finding the Balance, supra note 3; Treuthart, supra note 49, at 726-27. Penelope Eileen Bryan has discussed the need for attorneys to more adequately represent victim-clients in mediation. See Bryan, supra note 11. Nancy Ver Steegh also recognizes the need for attorneys to have further training to address the complex issues of family law mediations. See Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process, 42 Fam. L.Q. 659, 666-67 (2008). One example of the type of training that could be done is included in the Massachusetts Divorce Law Practice Manual. See Pauline Quirion, Representing Victims of Domestic Violence, in II MASSACHUSETTS DIVORCE LAW PRACTICE MANUAL ch. 25 (2008) (WL MDLPMAI MA-CLE 25-1).

187 Bailey & Denny, supra note 2, at 16.
such training could be valuable in helping them to best represent their clients’ interests and plan for their clients’ safety.\textsuperscript{188} In fact, one report has found that “attorneys and judges mishandle an array of domestic violence cases, in part because they lack basic education and knowledge on the issue.”\textsuperscript{189} In order to provide adequate training, victims’ advocates argue that law school courses should incorporate domestic violence issues more often and should sponsor more clinical programs offering legal services for abuse victims.\textsuperscript{190}

Family law attorneys should have training in both domestic violence issues and mediation in order to most effectively counsel and advocate for clients who are victims of domestic violence.\textsuperscript{191} In particular, appropriate training can help the attorney to act as a screener throughout the process to ensure that the client’s safety and interests are protected.\textsuperscript{192} Prior to mediation, a well-trained attorney can evaluate whether the case is even appropriate for mediation and can advise clients about other possible legal strategies or remedies.\textsuperscript{193} If lawyers are able to recognize their clients’ needs, lawyers can also “act as power enhancers and equalizers” during mediation sessions.\textsuperscript{194}

\begin{thebibliography}{99}
\bibitem{188} Id.; Buel, \textit{supra} note 20, at 720.
\bibitem{189} Buel, \textit{supra} note 20, at 722 (citing \textsc{The Gender Bias Task Force of Texas, Final Report}, Feb. 1994).
\bibitem{190} Id.
\bibitem{191} Id.
\bibitem{192} Murphy & Rubinson, \textit{supra} note 10, at 65-66 (“By learning and understanding the specific circumstances surrounding domestic violence and by knowing and understanding how mediation is likely to be conducted in a given jurisdiction, lawyers can counsel clients about whether or not mediation is an appropriate process.”).
\bibitem{193} Id. at 65.
\bibitem{194} Id. at 66.
\end{thebibliography}
4. Mediator-Domestic Violence Professional Collaboration

Scholars have also advocated more collaboration between mediators and domestic violence professionals. One of the key ways that collaboration has occurred has been through mediator training programs. Training organizers now regularly bring in domestic violence advocates to do components of their training, thus improving the level of communication between these two groups of professionals. Very recently, the call for collaboration was renewed once again, with a warning that a failure to collaborate may lead to the mediation community and the domestic violence community sending mixed messages. In some locations, the victims’ advocates and family courts and mediation programs have successfully collaborated to accomplish a number of goals, such as developing screening protocols and coordinating community responses to domestic violence issues. At the same time, the two communities still face significant

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195 Pearson, supra note 10, at 327; Salem & Dunford-Jackson, supra note 5, at 437; Ann W. Yellott, Mediation and Domestic Violence: A Call for Collaboration, 8 MEDIATION Q. 39 (1990); Ver Steegh & Dalton, Report from the Wingspread Conference, supra note 19, at 468-69 (“Need for Ongoing Collaborative Endeavor … Families will be better served if practitioners, researchers, advocates, clients, and policy makers engage in ongoing dialogue to identify shared knowledge about domestic violence and agree on areas warranting additional investigation and attention. Listening to diverse voices improves the likelihood that important issues will be addressed, gaps in knowledge identified, best practices developed, and unintended consequences avoided. … To the extent that professionals from different disciplines use different terminology to describe and discuss domestic violence, communication will be enhanced by working together to develop shared understanding and vocabulary. … Practitioners and researchers gain valuable insights from each other when given the opportunity for meaningful exchange. Empirical research is most useful to practitioners when it addresses issues and dilemmas that are currently being faced. Similarly, practitioners offer wisdom to researchers regarding pertinent questions and the need for pragmatic solutions. … Resources should be sought and allocated for the purpose of funding jointly identified research projects, enhancing communication about hypotheses and results, and implementing findings.”)

196 Pearson, supra note 10, at 327.
197 Id.
198 Id. at 442.
199 Id. at 444.
obstacles to increased collaboration, such as differences in how each defines domestic violence, a mutual lack of trust, and resistance to change.\textsuperscript{200}

B. Approaches to Family Mediation Program Design: Mediation Process

Although much of the focus of family mediation specialists and victims’ advocates has been on what happens prior to the mediation, such as the development of and use of screening protocols and mediator and attorney training programs, they have also stressed the importance of designing appropriate mediation processes in order to minimize the potential for power imbalances, intimidation, unfair agreements, and further violence or abuse.\textsuperscript{201} Much of the attention on the mediation process has been focused on two areas in particular: (1) the form of the mediation session; and (2) the presence of attorneys or support persons in the mediation session.\textsuperscript{202} An appropriate mediation process can reduce the potential for future violence and lead to more fair results that protect the legal interests of the victim.\textsuperscript{203}

1. Different Approaches to Form

The form of the mediation process can have a significant impact on the direction of the mediation, as well as on potential intimidation issues and safety concerns. Many

\textsuperscript{200} Id. at 444-50.
\textsuperscript{201} See, e.g., Ver Steegh, Yes, No, and Maybe, supra note 1, at 199; Buel, supra note 20, at 732; Pate, supra note 2, at 17; Corcoran & Melamed, supra note 5, at 312.
\textsuperscript{202} See, e.g., Ver Steegh, Yes, No, and Maybe, supra note 1, at 199; Buel, supra note 20, at 732; Pate, supra note 2, at 17; Corcoran & Melamed, supra note 5, at 312; McEwen, \textit{et al.}, supra note 2, at 1376.
\textsuperscript{203} See, e.g., Ellis & Stuckless, supra note 20, at 663-64.
scholars believe that caucusing with the alleged victim is an essential part of mediation where there is a history of domestic violence, although there is some variation in how they believe that caucuses should be used. For example, Lerman stresses the importance of the mediator meeting privately with the victim at the beginning of the mediation, in order to learn about information that the victim might not feel comfortable revealing in her abuser’s presence.

One approach is to hold the entire mediation session with the parties in separate rooms. Believing that mediation is usually not advisable where there has been past domestic violence, Sarah M. Buel argues that if a court orders mediation, the victim and the abuser should not be in the same room with each other during the mediation—in other words, the entire mediation would take place in caucus. Christine McLeod Pate has called this type of process “shuttle mediation.” California law provides for a similar “separate mediation” process when there is a protective order in place. If a party to the mediation is concerned about his or her safety in the mediation, the statute also allows that person to request that the mediation take place at separate locations and times. Although the Model Standards do not require separate mediation sessions, Standard XI.D.1 establishes that a mediator should consider, for the safety of participants and the mediator, “holding separate sessions with the parties even without the agreement of all parties.”

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204 Lerman, supra note 1, at 103-04; Ver Steegh, Yes, No, and Maybe, supra note 1, at 199; Buel, supra note 20, at 732; Pate, supra note 2, at 17; Corcoran & Melamed, supra note 5, at 312 (“Caucusing procedures may be utilized to ensure safety or disclosure.”).
205 Lerman, supra note 1, at 103-04.
206 Buel, supra note 20, at 732.
207 Pate, supra note 2, at 17.
208 Cal. Fam. Code § 3181; see also Edwards, supra note 6, at 662.
209 Cal. Fam. Code § 3181; see also Boxer-Macomber, supra note 14, at 889.
210 Model Standards of Practice for Divorce and Family Mediators, supra note 26, at 120.
Rana Fuller suggests an alternative form of shuttle mediation when an abuse victim’s attorney believes that the abuser is threatening or intimidating the victim, but the victim still wants the mediation to go forward:

[T]he victim would be in one room, the abuser in a second, and the attorneys and the mediator in the third. The attorney could work toward an agreement with only the mediator and opposing counsel or the abuser, then take the proposed agreement to the victim for discussion.\(^{211}\)

Fuller recognizes that her proposed shuttle mediation process could make a client feel like she is no longer in control of the process, and thus she cautions attorneys to fully communicate what happened in the meeting between the attorney, the mediator, and opposing counsel.\(^{212}\) Still, even with that communication this process has the potential to result in an agreement in which the domestic violence victim has had little voice. Even if it reflects her attorney’s beliefs about legal fairness, it may not fully reflect the victim’s personal wishes.

2. The Role of Attorneys, Support Persons, and Victims’ Advocates

Many scholars believe that victims should have the opportunity to be represented by advocates, either an attorney or some other person trained in domestic violence victim advocacy.\(^{213}\) One practitioner has advocated that “each time the court referred a victim to

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211 Fuller, *supra* note 58, at 949-50.
212 *Id.* at 950.
213 Lerman, *supra* note 1, at 104. *See also* Buel, *supra* note 20, at 732; Schepard, *supra* note 5, at 421 (“Some victims of domestic violence may have recovered their self-confidence enough to be a suitable mediation participant if advised by counsel and protected by appropriate safeguards in the mediation process.”); McEwen, *et al.*, *supra* note 2, at 1376 (“Lawyers prevent or moderate the effects of a fact to face encounter with an abuser, thus diminishing the likelihood of unfairness in domestic violence cases. … Past violence, which may be a key factor in determining whether the parties will submit to an unfair settlement or will be forced into a frightening situation, becomes less of a bargaining factor if the parties attend with their lawyers.”); Zaher, *supra* note 1, at 42 (“[A]ccess to legal expertise and advice must be
mediation or a mediator discovered domestic violence through screening, a pro bono attorney could be called upon to assist financially indigent victims through the mediation process.\textsuperscript{214} The thought behind including an attorney or another support person to attend mediations with the victim is that that person could help “balance negotiating power and eliminate intimidation and fears of underrepresentation.”\textsuperscript{215} An attorney, victims’ rights advocate, or other representative could help the victim to articulate his or her concerns within the mediation and provide advice about whether a proposed agreement is actually in the victim’s interest.\textsuperscript{216}

The Model Standards also stress the value of having parties represented by attorneys in mediation, both in situations in which the couples have a history of domestic violence and those that do not include such a history.\textsuperscript{217} Although the Standards state that “[t]he mediator should allow counsel for the parties to be present at the mediation sessions,”\textsuperscript{218} the Standards also allow the mediator to exclude an attorney from the session if only one party is represented by counsel.\textsuperscript{219} In Standard XI, which specifically covers domestic violence issues, the mediator is to “strongly encourage the parties to be

\textsuperscript{214} Pate, supra note 2, at 17. \textit{But see} Buel, supra note 20, at 722 (arguing that victims need legal representation but noting the shortage of attorneys available due to funding issues for legal services organizations); Murphy & Rubinson, supra note 10, at 65 (“An initial problem in approaching the role of lawyers in protecting victims of domestic violence is that the vast majority of such victims cannot obtain counsel.”).

\textsuperscript{215} Corcoran & Melamed, supra note 5, at 312.

\textsuperscript{216} \textit{Id.}

\textsuperscript{217} Model Standards of Practice for Divorce and Family Mediators, supra note 26, at 112 (Standard I.C) (“A family mediator should encourage the parties to seek information and advice from a variety of sources during the mediation process including their attorneys and other professionals, where appropriate.”); \textit{Id.} at 113 (Standard III.A.4) (Prior to mediation, the mediator should “encourage[e] the parties to employ independent legal counsel prior to the conclusion of the mediation process.”); \textit{Id.} at 116 (Standard VII.F) (“The mediator should recommend to the parties that they obtain independent legal representation before concluding an agreement.”); \textit{Id.} at 117 (Standard VII.G) (“The mediator should allow counsel for the parties to be present at the mediation sessions.”).

\textsuperscript{218} \textit{Id.} at 117 (Standard VIII.G).

\textsuperscript{219} \textit{Id.}
represented by counsel or an advocate throughout the mediation process if they are not already,” and to “allow[] a friend, representative, advocate, or attorney to attend the mediation sessions to support the victim of domestic violence.”

The Uniform Mediation Act requires mediators to allow parties to any mediation to bring a support person with them, and thus states that have adopted that provision of the UMA already have that right in place. States that have not adopted the UMA or another statutory provision similar to the support person provision should consider the reasoning behind the provision and institute their own versions of that right, as an attorney or victim’s advocate may be necessary to safeguard the legal interests of domestic violence victims. It is just another way of assuring that procedural safeguards will be maintained throughout the mediation process.

C. Approaches to Family Mediation Program Design: Other Considerations

Unlike some victims’ advocates who see mediation and the adversarial process as an either-or decision, some mediation advocates point out that there is nothing to prevent a victim from both proceeding in court to obtain legal protection against his or her abuser, whether in the form of a protective order or prosecution of the abuser, but yet also pursuing mediation of family issues. In fact, “[t]he availability of criminal proceedings mitigates concerns that in addition to power imbalances mediation fosters a ‘private’

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220 Id. at 120 (Standard XI.D.2).
221 Id. at 120 (Standard XI.D.4).
222 Uniform Mediation Act, § 10 (“An attorney or other individual designated by a party may accompany the party and participate in a mediation.”).
223 Ver Steegh, Yes, No, and Maybe, supra note 1, at 181.
resolution of a problem that many women’s advocates have sought to bring out of the ‘private realm’ and into public consciousness and condemnation.”

Additionally, knowledgeable mediators and mediation program administrators may also introduce both victims and abusers to other community and professional resources available to them. For example, some mediation proponents believe that the mediation process, because of its privacy and the role of the neutral mediator, actually encourages the abuser to admit his actions and seek help. Mediators can educate participants about a variety of options that may be available, including

batterers’ treatment and anger management programs; alcohol and drug treatment; dual-diagnosis consultants and treatment; victim support and treatment; posttraumatic stress groups; therapy; … supervised access and exchange facilities; reunification therapists; parenting coordination; assistance in implementing court-ordered parenting plans; treatment for traumatized children; parenting without violence classes; parenting education, skills training, and coaching; custody evaluation; child protection services; protective orders; removal of weapons; criminal penalties; court orders with triggers; suspended or supervised visitation; case management; interpreter services; housing and employment assistance; immigration services; establishing child support and paternity; child care; and advocacy.

Being in a position to offer information about these types of resources requires that mediation programs, supervisors, and mediators be prepared and educated about those resources beforehand. Screeners and mediators should have simple pamphlets and other forms of information readily available for parties, and mediator training

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224 Murphy & Rubinson, supra note 10, at 66 n.76.
225 Ver Steegh, Yes, No, and Maybe, supra note 1, at 181-82. See also Bigornia, supra note 5, at 60-61.
227 For example, the Franklin County Court of Common Pleas Domestic Relations and Juvenile Mediation Services program offers flyers with information about family counseling, youth counseling, and family violence resources.
programs should educate mediators about the range of resources that are available and how to put victims and their abusers in contact with those resources.\(^{228}\)

IV. STUDIES OF MEDIATION EFFECTIVENESS IN THE DOMESTIC VIOLENCE CONTEXT

Most of the arguments about mediation effectiveness where couples have a history of domestic violence rely upon anecdotal evidence rather than empirical data. For example, one scholar tells the story of a battered woman who felt that she had been unfairly intimidated into granting custody concessions to her husband during a mediation.\(^{229}\) Another describes an anecdotal account of a relationship that she argues would not be appropriate because of a ten-year history of physical abuse,\(^{230}\) but she include no specific data to support her point. Although these stories provide useful information, more systematic studies of mediation screening, training, processes, and outcomes are needed to determine what effect past domestic violence has on family law mediations and whether attempts to design systems to address potential problems are actually working.\(^{231}\) Many assumptions made by mediation advocates and victims’ advocates make sense on the surface, but it is important to determine whether those assumptions hold true in reality.

\(^{228}\) As an example, the Ohio Supreme Court’s domestic violence training program for mediators contains an exercise to have mediators identify services that are available to aid victims of domestic violence. OHIO SUPREME COURT, DOMESTIC VIOLENCE ISSUES, supra note 39, at 224-27. The training materials also provide a list of domestic violence resources, both statewide and local, available in Ohio. Id. at 457-68.

\(^{229}\) Hart, supra note 1, at 321-22.

\(^{230}\) Grillo, supra note 3, at 1600.

\(^{231}\) For example, Jessica Pearson has used a study of mediation practices in court-based mediation programs to determine how mediators address domestic violence cases, but that study did not include a survey of victims and batterers. See Pearson, supra note 10, at 319.
Scholars have completed numerous studies analyzing the effectiveness of mediation in the family law context,232 but very few of those studies have addressed the effect of history of domestic violence on those mediations. Those studies that have focused specifically on mediation in the context of a couple’s history of domestic violence are very limited.233 Although they provide some useful data, much more work is needed on this front in order to fully understand how domestic violence affects the


mediation process and how mediation programs can be designed to ensure safety and lead to fair, enforceable, and positive outcomes.

So what have we learned from the research thus far? First, scholars have spent much time comparing parties’ perceptions of mediation, private negotiations, and litigation as methods of solving family law disputes, usually analyzing participants’ satisfaction with the process and process results. In most cases, these studies have not analyzed whether couples who have a history of domestic violence have similar perceptions and results to those who do not have that history. In these studies, mediation usually compares favorably to other forms of dispute resolution.

A small number of studies have studied the effects of a history of domestic violence on a couple’s ability to mediate their differences successfully. These studies help to establish a preliminary understanding of the issues discussed in this article, although much more needs to be done to fully understand what effects domestic violence may have on the mediation process and outcomes—and what mediation programs,

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234 See, e.g., Reynolds, et. al., supra note 232; Bohmer & Ray, supra note 232; Kelly, Mediated and Adversarial Divorce, supra note 232; Jessica Pearson, The Equity of Mediated Divorce Settlements, 9 MEDIATION Q. 179 (1991); Emery & Jackson, supra note 232; Pearson & Thoennes, supra note 232; Mary G. Marcus et. al., To Mediate or Not to Mediate: Financial Outcomes in Mediated Versus Adversarial Divorces, 17 Conflict Resol. Q. 143 (2007).

235 See supra note 234.

236 See, e.g., Marcus, et al., supra note 234 (finding that, among mediated and adversarial cases, there was virtually no difference in women receiving or being required to pay alimony, but that women who mediated were more likely to obtain a greater percentage of joint assets, receiving alimony longer, or obtaining more child support than those women who litigated their cases); Reynolds, et al., supra note 232 (finding no increase in the number of joint custody arrangements resulting from child custody mediations); Kelly, Mediated and Adversarial Divorce, supra note 232 (parties usually more satisfied with mediation process than with litigation). But see Bohmer & Ray, supra note 232 (finding no differences in outcomes for women between mediation and litigation in Georgia but determining that mediation settlements were not as beneficial to women as adversarial results in New York).

237 See, e.g., Chandler, supra note 1; THANS Study, supra note 10; Pearson, supra note 10; Murphy & Rubinson, supra note 10; Ellis & Stuckless, supra note 20; King, supra note 233; Thoennes, et al., supra note 233; Wissler, supra note 233, at 29.
mediators, and attorneys can do to protect victims and make the process more safe, fair, and effective.

No studies thus far have sought to expand the scope of their inquiry into the full range of issues discussed in this article, including the connection between mediator training and effective, safe, and fair mediation screening, processes, and outcomes; whether particular types of screening are more effective at identifying cases that should not be mediated or need special protocols in place; what perceptions mediation participants have of the mediator, mediation process, and mediation outcome and how those perceptions correlate, if at all, to mediator training and process design; comparisons between different programs that have different approaches to these issues; and whether other factors such as the race, ethnicity, income, educational background, etc. of the mediation participants have any influence on what works and does not work in this context.

V. The Need for Further Studies

Most scholars and victims’ advocates agree that the first step in having effective mediations is proper screening of mediation participants. Screening should have three important goals: (1) determining what cases are not suitable for mediation because of concerns about safety, severe power imbalances, or other issues; (2) making the mediator aware of domestic violence issues or other issues that could interfere with a fair, safe mediation process and therefore will have to be carefully managed; and (3) educating alleged domestic violence victims about how the mediation process will work, what
rights they have, what resources are available to them, etc. Family-law mediators should have mandatory training and continuing education requirements for domestic violence issues, in order to help them be more effective screeners and more able to recognize power dynamics and potential safety issues within mediations.

The question then becomes, how does this work in practice? If mediators use screening in an attempt to accomplish the above goals, are they effective in doing so? Does training in domestic violence issues make a mediator more effective and, if so, how can that effectiveness be measured? Is it possible to design a mediation process whereby a victim of domestic violence feels safe in negotiating an agreement with his or her alleged abuser, is empowered to be involved in the mediation process in a meaningful way, and feels that the process and outcome are fair? To what extent do factors such as economic status, race, ethnicity, immigration status, sexual orientation, or other factors make a difference in the mediation process and its outcome? Does it make a difference, in the domestic violence context, if mediation is required or voluntary, is part of a court-sponsored program or community mediation program, or is staffed by paid mediators or volunteers? A systematic study of family law mediation programs could address at least some, if not all, of these questions.

The following are some background questions that such a study should consider, related to the mediation program, screening process, mediator training, and other issues. This information is relevant to understanding the results of any interviews/surveys/questionnaires of parties to the mediations.
• How is the mediation program structured? Is mediation voluntary or mandatory? How do the parties come to mediation—are they referred by the courts, for example, or do they seek out mediation on their own?

• What screening process does the mediation program use? Does the mediation program use a questionnaire, individual interviews, or a combination of the two? What questions are asked as part of the screening process? Who handles the screening process—the mediator, mediation program staff, or court personnel?

• When a screener determines that the relationship involved domestic violence, how does the screener decide whether the parties are capable of mediating their dispute? What factors are considered most important to the screener?

• What is the educational background, training (in domestic violence issues and mediation), and experience of the screeners and mediators involved in the program?

• What types of techniques are mediators trained to use in mediations when the parties have been involved in domestic violence?

If possible, the study should incorporate any written results of the screening process for those cases involving domestic violence, in order to have more context for the questions that would later be asked of the mediation participants.

As part of the study, mediation participants should be surveyed regarding their experiences. Most survey questions would focus on alleged victims of domestic violence who are parties to mediations, but it would also be helpful to do an abbreviated form of the survey for the alleged abusers, focusing on their perceptions of fairness of the process and their satisfaction with the mediation process, the mediator, and any agreement that
was reached. The following are some topics that a survey should focus on, in order to determine how satisfied participants were with the mediation process as well as more generally how effective mediations are when there is a history of domestic violence.

- Post-Mediation Threats or Incidents of Domestic Violence: Were there were any later incidents of domestic violence or threats of violence (post-mediation)? If so, a follow-up question would ask whether the victim felt that that incident(s) was related to the mediation.

- Participant Satisfaction: Was the participant satisfied with the mediation process? This question could actually be asked of both mediation participants. It would be interesting to see whether alleged abusers perceived any bias on the part of the mediator because of the mediator’s attempts to manage any power imbalances during the mediation. It is also important to understand whether victims felt satisfied with the mediation process. Would the participant use mediation again or recommend it to others for resolving family law issues?

- Safety: Did the victim feel that he or she was safe during the mediation process? What things did the mediator do that made the victim feel more/less safe? Was there anything about the mediation process itself that made the victim feel more/less safe? What could the mediator do differently to ensure safety?

- Outcome: Was there an agreement reached? If so, were both parties satisfied with that agreement? Did each party feel that the agreement was workable?

- Mediation Process: Did the mediator use caucuses/meet separately with the participants during the mediation? If so, what did the parties feel about these
separate meetings (i.e., were caucuses/separate meetings helpful, did they make the victim feel safer, etc.)?

- Did the mediator do anything else in the screening process or during the mediation process that the participants felt was effective/ineffective?
- The survey should also ask demographic questions related to economic status, race, ethnicity, immigration status, sexual orientation, and other factors that may have an impact on how data should be interpreted.

Using the above approach, a large-scale study of mediation participants, from a variety of different mediation programs that use different approaches to screening, mediator training, and other aspects of the mediation process, would provide a greater understanding of what currently works and what could be done better in mediating family law disputes where the couple has a history of domestic violence. It is not enough to assume that screening, training, and other innovations are working—we must know that these approaches are effective. Regardless of whether everyone agrees about the appropriateness of mediation in these situations, it is indisputable that mediations do take place and will continue to do so. In order to work towards a mediation process that is safer, more fair, and less traumatic for victims of domestic abuse, we have to know what works and what does not.